UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

SONIC AUTOMOTIVE, formerly d/b/a CAPITOL FORD, currently d/b/a FRIENDLY FORD

and Case 32–CA–19327-1

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, DISTRICT LODGE 190, LOCAL LODGE No. 1101, AFL-CIO

Valerie Hardy-Mahoney, Oakland California, for the General Counsel.

Robert G. Hulteng and *Philip R. Paturzo,* of *Littler Mendelson,* San Francisco, California, for Respondent.

David A. Rosenfeld, of *Van Bourg, Weinberg, Roger & Rosenfeld*, Oakland, California, for the Charging Party

DECISION

Statement of the Case

JAMES M. KENNEDY, **Administrative Law Judge**: This case was tried in San Jose, California on September 18, 2002, [1] based upon a complaint issued March 22 by the Acting Regional Director for Region 32. The underlying unfair labor practice charge was originally filed by the International Association of Machinists & Aerospace Workers, District Lodge 190, Local Lodge No. 1101, AFL-CIO, on January 7, subsequently amended on March 22. The complaint alleges that Sonic Automotive formerly d/b/a Capitol Ford, currently d/b/a Friendly Ford (herein called Respondent) violated §8(a)(1) and (5) by making various unilateral changes in working conditions and simultaneously engaging in direct dealing with the employees rather than going through the Union. It also asserts that Respondent committed two independent violations of §8(a)(1) by threatening an employee because of his union activities. Respondent denies the allegations.

[1] All dates are 2002 unless stated otherwise.

Issues

The independent §8(a)(1) allegations assert that Respondent, on two occasions, acting through two different supervisors, threatened union steward Keith Scarboro with discharge as a reprisal for his union activities. Respondent denies the incidents and argues that, in any event, one of the individuals is not the supervisor as defined in §2(5) of the Act. With respect to the §8(a)(5) allegations, the complaint asserts that Respondent breached the bargaining obligation in four different respects: 1. modifying a productivity bonus program in October or November, 2001; 2. Changing its policies regarding paid holidays for both the Friday after Thanksgiving, 2001, 3. and Christmas Eve, 2001. 4. On January 9 changing the pay periods. Respondent defends on several grounds, including de minimis, waiver, no change occurred, and, in the case of the pay period change, that it was only an administrative change not affecting employee working conditions.

The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to orally argue and to file briefs. The General Counsel, the Charging Party and Respondent have all filed briefs which have been carefully considered. Based upon the entire record of the case, as well as my observation of the witnesses and their demeanor, I make the following:

Findings of Fact

I. Jurisdiction

According to the pleadings, Respondent is a California corporation [2] with an office in place of business in San Jose, where it operates an automobile dealership where it sells and services new and used motor vehicles. It admits that during the calendar year beginning May 8, 2001, in the course and conduct of its business it has derived gross revenues exceeding $500,000 and during the same period it purchased and received goods originating outside California valued in excess of $5000. Accordingly it admits that it is an employer engaged in commerce within the meaning of §2(2), (6) and (7) of the Act. It further admits that the Union is a labor organization within the meaning of §(5) of the Act.

II. The Alleged Unfair Labor Practices

a. The Setting

On May 8, 2001 Respondent took over the Ford dealership located on West Capitol Expressway in San Jose known as Capitol Ford. [3] At the time of the takeover, Capitol Ford had been a member of a multiemployer association and bound to a master collective bargaining agreement with the Union which was not scheduled to expire until October 31. The General Counsel and Respondent both agree that Respondent is a successor employer within the meaning of the Supreme Court's decision in *NLRB v. Burns Security Services*, 406 U.S. 272 (1972). As such, it was obligated to recognize the Union, and it did so. At the same time, it was not required to accept the Predecessor's collective bargaining contract; instead, it was free to set its own initial terms and conditions of employment for those employees in the bargaining unit. It did that as well.

[2] The dealership in question is part of a national chain of dealerships. Testimony shows it to be one of approximately 180 dealerships owned by Sonic Automotive whose headquarters are in Charlotte, North Carolina.

[3] Respondent continued to do business under the Capitol Ford trade name for almost 6 months before converting to its current trade name, Friendly Ford.

The bargaining unit, not in issue here, covers the automotive machinists, mechanics bodyshop workers, painters, service writers and dispatchers but excludes auto sales personnel and other appropriate exclusions. Respondent, upon its takeover, issued its own employee handbook and immediately signed a recognition/interim agreement. [4] The parties, pursuant to that recognition agreement, as of the date of the hearing, had not yet reached an agreement. They had nevertheless engaged in extensive bargaining, including eight meetings during 2002 and five meetings in 2001. The complaint does not allege that Respondent has engaged in bad faith bargaining during any of those negotiations.

As part of its initial terms and conditions, Respondent established a pay scale known as the "Sonic package" (not in evidence). This system of recompense set levels under both hourly and flat rate calculations. Both Respondent and the Union considered those levels as minimums, and over-scale wages were allowed. In fact, business agent Glenn Gandolfo testified that the Predecessor's collective bargaining contract expressly permitted over-scale wages. He also testified that during a bargaining session in October 2001 the Union had become aware that Respondent was paying wages over the initially established scales and the Union did not object to the practice. It is reasonable, I think, to conclude that the Union's policy is to encourage employers to pay workers beyond the minimums established, whether based on a collective bargaining contract, initial fiat, experience or to reward demonstrated excellence. [5]

Consistent with that policy, the Union does not appear to oppose bonuses or other types of remuneration. Although occurring some 10 months after the incentive plan under scrutiny here, Gandolfo wrote Respondent a letter on August 30 encouraging pay raises for the bargaining unit based on "length of service, change of class, or proven ability." He went on to say that the Union would not take action against the Company during negotiations because of such a grant. He added that likewise, the Union did not oppose the grant of "bonuses, spiffs, or other remuneration given by the manufacturer or the company."

Among other things, the handbook established eight paid holidays, one of which was a day which could be scheduled by the department manager between December 24 and January 2. The named holidays included Thanksgiving Day and Christmas Day. Neither the day after Thanksgiving nor Christmas Eve was listed. Those omissions were a departure from the predecessor's collective bargaining contract which had specifically granted the day after Thanksgiving and Christmas Eve as paid days off.

During the period in question here, Respondent's General Manager was Gary Potter. [6] its service manager was Andrew McDonald; the maintenance and detail manager was Omar Infante; and the used car reconditioning person was John Swarthout. Respondent acknowledges the supervisory status of Potter, McDonald and Infante. It asserts that Swarthout is not a supervisor within the meaning of § 2 (11) of the Act. Both Infante and Swarthout are alleged to have said things which allegedly violated §8(a)(1) of the Act. The individual to whom the remarks were supposedly directed was Keith Scarboro. Scarboro had been a longtime

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[4] The recognition agreement not only included an affirmative agreement to meet and bargain in good faith, it committed Respondent to make contributions to the pension fund and health plan.

[5] Gandolfo's testimony:

Q BY MR. HULTENG: And in dealings with this employer, have you in fact informed the employer that the union does not oppose the granting of any above scale paid to employees?
A [WITNESS GANDOLFO] Yes.

[6] At some point after the events recounted here, Potter became the regional director of used cars for the nine Sonic dealerships in the North Bay. He is no longer resides in Northern California, living now in Payson, Arizona, and commuting to California three times a week.

employee with Capitol Ford, originally hired in 1989 and, except for a short hiatus in the early 1990s, had worked continuously at the facility until he quit in November 2001. For some period of time prior to his departure he had been the union steward. He was succeeded as steward by Rod Stamps. Both of those individuals testified in support of the General Counsel's case.

b. Scarboro 's Testimony

As noted, Keith Scarboro was the Union's longtime steward. He was also a member of the Union's negotiating committee. Respondent had retained him when it took over the dealership. He was a technician assigned to the used car reconditioning operation which was run by John Swarthout. Scarboro said that sometime during October, he was in Swarthout's office picking up a work order. He testified Swarthout arose from his desk, checked to make certain no one was listening and closed the office door. Swarthout then told Scarboro "Hey, by the way, watch your ass man, because they want to get you."

Similarly, at about the same time, Scarboro says he was near his work area walking toward the parts department when he encountered detail manager Omar Infante. He says Infante told him "You know, watch your ass man, they're out to get you, watch your ass." When Scarboro asked Infante what he meant, Infante replied, "You know what they say: Cut off the head and the body will fall." Scarboro says he asked Infante where he had heard that from. Infante replied, “Potter.”

Neither of these statements has any particular context, although when pushed for more information, Scarboro said Swarthout’s comment came after they had been talking about contract negotiations. Even with that addition, specific context is wanting. Infante is Scarboro’s longtime personal friend and co-worker. Swarthout had been put in charge of used car reconditioning upon the May takeover, but he had previously worked at the dealership as a parts man. Both were on very good terms with Scarboro.

Swarthout denied that such conversation had occurred. According to him, he has never heard Potter or any manager say they were looking to get rid of Scarboro. Infante denied ever having such a conversation with Scarboro, specifically saying that he never told Scarboro to 'watch his ass' or making a remark to the effect that if you cut off the head, the body will fall.

In assessing the relative credibility of these witnesses, one cannot ignore Scarboro's intense dislike of Respondent. Respondent's counsel asked why he had voluntarily terminated his employment and Scarboro replied, without much explanation, that he "wasn't going to work for these people after what had been going on for seven, eight months." He explained that 'these people' referred to the Sonic management, apparently particularly those who were negotiating the new collective bargaining contract. He agreed that he 'absolutely' disliked Sonic and the people associated with it. His rancor, like his testimony, has little context. Whatever the source of his negative attitude toward Respondent, it has not been articulated in the record. Even so, his bitterness is striking. [7]

Scarboro's approach to describing what occurred is in sharp contrast to the matter-of-fact approach taken by both Swarthout and Infante. Furthermore, Potter credibly testified that the phrase 'cut off the head and the body will fall' is not an expression that he uses. He denied

[7] Neither Potter nor McDonald were members of Respondent’s negotiating team. According to Mike Cervantes, Regional Fixed Operations Director for Sonic, their exclusion from collective bargaining was by corporate design. It seems, therefore, that Scarboro’s resentment was aimed at the negotiators, perhaps because of what he perceived as lack of progress.

telling Infante any such thing and Infante agrees. Based on demeanor alone, is difficult to credit Scarboro. Furthermore, given the lack of context and his testimony that these remarks came out of the blue, the probability of such an occurrence is low. Furthermore, the General Counsel needed to lead Scarboro to the specific conversations.

It seems to me that Scarboro's clear bias renders his testimony suspect. Coupled with its other shortcomings, I am unable to credit him. Accordingly, I find the evidence to be insufficient to support a §8(a)(1) violation. Moreover, even if one credits Scarboro's testimony, it is difficult to assign a discriminatory meaning to the words. I find the phrases used ('watch your ass' and 'if you cut off the head, the body will die', are very ambiguous in the circumstances. Certainly they're not connected to union activity, except by innuendo. Other innuendos might well be fashioned, too. To draw the conclusion which the General Counsel wishes is too much of a reach, given Scarboro's inability to put the phrases in any sort of context. There is no evidence that Scarboro had done anything to warrant Potter's attention and certainly no evidence that either Infante or Swarthout harbored any union animus of their own. Therefore, no context, and certainly no antiunion context, may be reasonably inferred. These statements simply do not amount to interference, restraint or coercion as required by §8(a)(1). The allegation should be dismissed. Accordingly, there is no reason to determine whether Swarthout was a statutory supervisor through whom Respondent may be charged with an unfair labor practice.

c. The October 2001 Productivity Bonus

The complaint alleges that in late October or early November 2001, Respondent 'modified' the productivity bonus program which had been established for October. In her brief, counsel for the General Counsel seems to be modifying the complaint's theory. She argues, without moving to amend, that Respondent unilaterally implemented the program in violation of §8(a)(5), not just that it modified the program as alleged. Neither does she acknowledge any theory change. The testimony, as taken, focused solely on the modification. [8]

The record demonstrates that both before and after the bonus program under scrutiny here, both the Predecessor [9] and Respondent had run similar incentive events. The employees were familiar with the terminology and the practice from their experience with the Predecessor, and Respondent had maintained a service advisor bonus program already in effect, albeit with some slight modification. Technicians were also eligible for a $500 recruiting bonus in the event they were able to recruit a new mechanic who lasted 90 days with the dealership. And, although, not of significant value, in August 2001 it had taken the staff out for pizza and beverages consistent with a promise to do so in the event the dealership reached a gross profit level of $325,000 for that month. None of these bonuses or programs was negotiated with the Union.

In October 2001, Potter announced the so-called "Big Dog Contest," an incentive program aimed at the service technicians. He said that a $5000 'kitty' was being created which could be divided among all the qualifying employees. Originally, to qualify, the technicians had to be 90% productive during the month of October and the service department gross profit had to reach 70%. The modification occurred when service director Andrew McDonald and Potter

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[8] An example is the question she propounded to the Union's business representative:

BY MS. HARDY-MAHONEY: Did the union ever agree that a bonus program that was implemented in October 2001 could be *modified* in any way?

A [WITNESS GANDOLFO] No. I never even knew.

[9] The Predecessor's collective bargaining contract, article XII, specifically authorized it to institute an incentive pay program.

realized that even though a number of employees were close to reaching the program's targets, the 70% gross profit level would not be met, and that few ,if any, of the employees would reach the 90% productivity rate. Furthermore, McDonald had heard that some of the employees were supposedly thinking of sabotaging the program by unclear means. He reported what he had heard to Potter. As a result of all that information, Potter decided to try to save the program. He knew the staff was close to the 70% level and he knew that a number of the employees were working very hard. He could see that he had nine employees who were over the 90% level and that the productivity of four others had shown a marked increase even though they were not yet at the 90% rate. Even though he knew he was diluting the number of 'winners', he wanted to find a way to reward those who had made significant progress. He also knew, because the 70% gross profit target had not been reached, if he followed the program's announcement to the letter, there would be no 'winners' at all. He decided to include every technician who had either reached the 90% mark or who had shown marked improvement. After all, he reasoned, he was trying to induce and reward better performance. As result, he selected thirteen employees who met the modification to divide the $5000 pot equally. Each of those thirteen received a bonus of $384.62. He did not tell the mechanics that the program had been modified to improve everyone's eligibility; he just announced the recipients.

d. The Two Paid Holidays

Article VII of the Predecessor's collective bargaining contract listed a number of contractual paid holidays for the service department employees. These included the Friday following Thanksgiving and the day before Christmas Day (Christmas Eve). These holidays had been in the collective bargaining contract for many years. Indeed, since it was a multiemployer association contract covering a number of South Bay dealerships, those holidays had become part of the auto mechanics' culture. When Respondent acquired this dealership, its employee handbook established for the service department employees eight paid holidays. Neither the Friday after Thanksgiving nor Christmas Eve was included. It did allow for an additional holiday to be scheduled by management between December 24 and January 2. It also allowed for a floating holiday.

Although the dates are not specific, sometime in mid-November 2001, Respondent posted the work schedule for the day after Thanksgiving. Consistent with its employee handbook it had begun taking service appointments for that day. That posting cause an immediate uproar within the technicians' ranks. Their dismay resulted in a meeting conducted by service director McDonald. Both he and shop steward Rod Stamps agree that the entire staff voiced intense opposition to working that day. The employees observed that the day after Thanksgiving had been holiday for about 25 years. McDonald remembers hearing a strong undercurrent from employees to the effect that they would not work that day. His recollection is confirmed by Stamps' testimony. Stamps agreed that he told McDonald that the employees would not work on the Friday after Thanksgiving. McDonald informed Potter and after learning that the only service departments on the Capitol Expressway to be open that Friday were at a Nissan dealership owned by Sonic and a Toyota dealership. While the record does not reflect the number of auto dealerships on that road, it is clear that it is an auto row with a large number of similar businesses. Upon learning that, Potter decided that it was in the best interest of the dealership to close the service department that day and to keep a happy work force he would pay the service staff for 8 hours work that day. The Company did so.

A similar incident occurred for Christmas Eve. Stamps described a near identical uprising. Again, the employees threatened not to work. This time Respondent exercised its right under the employee handbook and announced that Christmas Eve was the additional holiday which it had reserved under its rule. On December 7, 2001, Respondent issued a

memo to its employees setting forth the service department work schedule for Christmas and New Years. Respondent also paid the service department employees 8 hours pay for the Christmas Eve holiday.

e. The Pay Period/Payday Change

When Respondent took over the operation from the Predecessor in May 2001 it established a local payroll system. All of the data was collected locally and paychecks were written at the dealership. At that time its pay period ran from Wednesday to Tuesday. Paychecks were distributed that Friday. As noted above, Respondent is just one of over 180 dealerships nationally operated by Sonic Automotive, which is headquartered in Charlotte, North Carolina. For administrative reasons, the national headquarters had determined to centralize its payroll from Charlotte. It had established a web-based payroll system and in the first part of 2002, imposed it upon Respondent. [10]

On January 9, Potter conducted an employee meeting and announced that the dealership was changing the pay period. The new pay period was to begin on Sunday and end on Saturday; paychecks were to be distributed the following Thursday. He explained that this change would mean that on the first payday under the new system, Thursday, January 10, the employees would receive a 3-day paycheck. It was to cover work performed on January 2, 3, and 4, the Wednesday, Thursday and Friday of the previous week, but not January 7 and 8, the Monday and Tuesday of the old cycle, days which had now been moved to the new pay cycle beginning Sunday, January 6.

Steward Rod Stamps and most of the technicians protested and said they did not want to change the pay period because it would result in their losing 2 days' pay [from that paycheck]. They became very upset and Potter decided that he needed to discuss the matter at a higher level within the Company. Later that afternoon Potter and McDonald resumed the meeting. Recognizing that short paychecks might result in some hardships, Potter said that for those employees who were interested, the Company would allow them to "draw" against future wages to make up for the shortage. They were to pay back the draw over the next four checks, by having 4 hours wages deducted each of those weeks.

Over half of the employees accepted Potter's offer; the remainder did not. The others, including Stamps, refused to accept the 3-day check. Those who accepted the offer received two checks roughly equalling a full week's pay.

The two days pay, representing January 7 and 8, is now carried as part of the holdback. Holdback is the amount of money held by an employer between the end of the pay period and the day the paycheck is issued. Previously, this dealership's holdback was from Tuesday to Friday, a holdback of 3 days. Under the new system the holdback is from Saturday to Thursday, a holdback of 5 days. Nonetheless, the two unpaid days continue to roll forward. According to Respondent, those days will be paid whenever an affected employee separates from the Company.

[10] That change required all dealerships, including Respondent, to collect the payroll data and transmit the information electronically to an Atlanta payroll processor. Respondent now sends that information to Atlanta every Monday. The Atlanta processor then creates the paychecks and sends them out each Tuesday by an overnight express company, arriving in San Jose on Wednesday. Since payday is Thursday, that system allows for a one-day cushion in the event the express company's delivery is delayed.

III. Analysis and Conclusions

The independent §8(a)(1) threat allegations have been dismissed on their facts above. I now proceed to the §8(a)(5) contentions. The first is the unilateral change allegations.

As noted in the introductory portion of the decision, Respondent has acknowledged its successor status within the meaning of *NLRB v. Burns Security Services*, 406 U.S. 272 (1972). To that end, it took advantage of the opportunity and set its initial terms and conditions of employment; it also signed an interim agreement with the Union, recognizing the Union as the §9(a) exclusive collective bargaining representative of the service department employees.

Since *NLRB v. Katz*, 369 U.S. 736 (1962) it has been an unlawful under §8(a)(5) for an employer to circumvent its bargaining obligation with the §9(a) representative of its employees by making unilateral changes in their wages, hours, and terms and conditions of employment. The Supreme Court relatively recently reiterated that rule of law. In *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190 at 198 (1991), the Court quoted itself to say: "[A]n employer commits an unfair labor practice if, without bargaining to impasse, it effects a unilateral change of an existing term or condition of employment."

Initially, there is always the question of whether a change has actually occurred. Therefore, one must first find a benchmark, the place from which the new status must be measured. Second, the rule is not without its exceptions. For example, the rule does not apply in cases of waiver [*Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983)] or insignificance [*Rust Craft Broadcasting of New York*, 225 NLRB 327 (1976)].

In successor situations such as this, the Board has held that the predecessor's terms and conditions of employment, particularly those established by collective bargaining, are to be recognized as the starting point, i.e., the benchmark. In *Holiday Inn of Victorville*, 284 NLRB 916 (1987), the Board said:

> Except for matters on which a successor employer sets its own initial terms, the terms and conditions of employment of union-represented employees will normally be those established by the predecessor's collective-bargaining agreement or by the predecessor acting unilaterally to the extent that the union had waived bargaining. Practices thus established are the existing practices. They are kept in place simply by virtue of Section 8(a)(5) of the Act rather than by force of contract, however, because a successor employer is not bound to adopt a predecessor's collective-bargaining agreement. [citing *Burns*].

Therefore, following *Holiday Inn of Victorville*, the benchmark from which we begin our analysis is the terms and conditions established by the collective bargaining contract to which the Predecessor was bound, albeit as modified by the initial terms and conditions announced by Respondent when it took over the dealership. Therefore, the benchmark here is two-fold: 1. the initial terms and conditions set by Respondent to the extent that they are actually new or that they modified the Predecessor's terms; and 2. the Predecessor's terms and conditions which Respondent did not seek to modify. Therefore, there is a mix of both old and new.

Insofar as the Productivity Bonus is concerned, there is no doubt that the Predecessor utilized productivity bonus programs in much the same fashion as Respondent did here. This was not a departure of any kind. The employees were familiar with such programs from their experience with the Predecessor. It was an established term and condition which preceded Respondent's takeover and was unaffected by the new employee handbook or the recognition agreement; it was left over from the Predecessor.

Therefore, when Respondent announced the 'Big Dog' incentive, it was not making any sort of change; it was following a procedure established many years before by the Predecessor. To the extent that the General Counsel is claiming (via a sub silentio complaint modification) that the establishment of the program was a change, the contention is without merit. Similarly, since Respondent had the right to set the incentive program's rules, it was likewise free to modify those rules so long as it maintained its fundamental goal. When Potter realized that none of the employees would qualify under the original announcement, he knew his goal of better productivity would be defeated, for he would be perceived to have set the bar too high. From an employee perception, if no technician could prevail and win the bonus, the goal would be regarded as unachievable. Moreover, Respondent, their new employer, would make itself out as parsimonious, if not dishonorable. Potter could not allow that to happen, for he understood that employee morale was critical to a successful business enterprise. He knew that if he denied the prize in its entirety, the employees would not only be disappointed, they might well become disgruntled. As far as he was concerned, the $5000 kitty had already been committed toward improved productivity/morale and it would only have a negative effect if it were not spent as intended.

Knowing that he had the right to set the rules for winning, Potter believed, correctly in my view, that he also had the right to make certain that the program succeeded. Therefore, he had the power to cure any defect so long as the program maintained its primary purpose, improving productivity. In the final analysis, this incentive program was nothing more than a management tool to improve efficiency. It is accurate to say that the wage component, the winnings, was not the driving purpose of the program. Improving productivity was the principal goal and that the award money was simply an inducement to reach that end. Such a tool has long been recognized by the Union as a legitimate instrument available to management to induce better performance. [11] Accordingly, I find that Respondent did not make any unlawful unilateral change. The system had been in place before Respondent acquired the facility and it simply utilized it in the same fashion that the Predecessor had. This allegation will be dismissed.

With respect to the two holidays, the analysis is little different. Here Respondent did set the initial terms and conditions as they related to paid holidays. The handbook issued simultaneously with the acquisition specifically omitted the day after Thanksgiving and Christmas Eve as paid holidays. Those days had been holidays under the Predecessor's collective bargaining contract with the Union. Respondent's plan was to reduce the number of paid holidays and the handbook reflected that policy. However, in the handbook Respondent had specifically reserved to itself the right to declare a paid holiday during the end-of-the-year Holiday Season.

At first blush there appears to be no doubt that Respondent changed its initial terms and conditions insofar as the day after Thanksgiving is concerned. In response to both employee complaints and employee threats to refuse to work that day, Potter decided to grant a paid holiday for the day after Thanksgiving. The employees had come to expect that day as a paid holiday and were not willing to accept Respondent's policy. There is no question that Potter considered the employees' vehemence as a genuine threat to the viability of the workweek. Most of the employees said that they would not work that day, and those that did not told McDonald that they wanted to take a vacation day. Both McDonald and Potter realized that the Friday service department appointments could not be met. This meant there was a dual

[11] The only caveat might be that management could not use it in a discriminatory fashion. Such a contention has not been made here, nor does the evidence suggest that the program was abused in such a way. Indeed, such a claim would require the invocation of a different section of the Act.

problem. First, they knew there would be customer repercussions that Friday in the event customers brought their automobiles in for service pursuant to an appointment which would then be dishonored. Second, in the event the employees carried out their threat, there was very little Respondent could do about it. It risked losing the entire staff if it disciplined them for not coming to work that day. Indeed, discipline would have been counterproductive (and possibly unlawful under §8(a)(1)). Again, seeking to make the best of a bad situation, Potter decided that it was premature to impose Sonic's policy. The employees were simply not ready to accept it. Therefore, he made the decision to honor the culture which had been established under the Predecessor's collective bargaining contract.

Yet, despite the change's apparent clarity, in a very real way, the decision can be viewed as no change at all. After all, the established practice (as opposed to nascent policy) was to grant the Friday after Thanksgiving as a paid holiday. Although the change had been announced, Respondent had never actually implemented its desired plan of requiring work that day. Indeed, insofar as the unionized portion of the auto repair service trade is concerned, the paid day off was the industry norm. Meeting that standard was an acceptance of the status quo.

In another way, Respondent may well be viewed as having accepted a fait accompli levied upon it by the employees. It had no real other choice. It certainly did not seek to grant the paid holiday out of a sense of altruism or duty. It only responded to an employee-generated threat to refuse to work that Friday. Given the fact that the employees, apparently led by their shop steward, were seeking to maintain what they viewed as a long-established benefit, it can hardly be said that this employer's response was either intended to or actually had the effect of undermining the Union. Instead, the employees, led in a collective effort by their steward, were able to maintain a standard established by the Union.

In fact, one may properly ask whether any different response would have been given by the Union had Potter asked. Potter's question would have been, 'Is it okay to give the employees to a paid holiday on the day after Thanksgiving?' The Union would either have said that it was or it wasn't. If the Union had given its approval, the employees would have received exactly what they did receive, a day off with pay. If the Union had said no, and asked to bargain about it, the employees would have remained disgruntled, and the Union would have risked their disfavor. The likelihood that the Union would have said no is virtually nil. Therefore, as a practical matter the employees achieved exactly what the Union would have asked for, and they did it with the leadership of their union steward. How such a result is contrary to the Union's institutional interest escapes me.

For practical reasons I conclude that this matter simply does not rise to the level of an unfair labor practice. A cease-and-desist order would not accomplish anything and an affirmative remedial order would not accomplish much, either. I shall recommend that the complaint be dismissed insofar as the day after Thanksgiving is concerned.

With respect to Christmas Eve, the result must be the same, albeit for a different reason. Here, when Respondent established its initial terms and conditions through its handbook, it reserved the right to grant a paid holiday between Christmas Eve and the end of the Holiday Season. When faced with the same sort of employee dissatisfaction as a result of its posted schedule, Respondent simply exercised the right it had reserved to itself to grant a paid holiday during that period. No change of any kind ever occurred, for its conduct was an integral part of its initially established terms and conditions. No complaint can be made concerning the addition of this paid holiday. This matter, too, will be dismissed.

Insofar as the change in the pay periods is concerned, I am less impressed with Respondent's explanation. There is no question that the frequency of wage payments is a mandatory subject of bargaining. *S & I Transp., Inc.*, 311 NLRB 1388, (1993) (presenting employees and union with change from one-week pay period to two-week pay period an

unlawful fait accompli and is a breach of the bargaining obligation under §8(a)(5).) Cf. *South Carolina Baptist Ministries,* 310 NLRB 156, 188 (1993) (employer changed from one week to two week pay periods during negotiations without bargaining to impasse.)

Here, as a result of an administrative convenience to itself, Respondent inflicted an inconvenience upon its employees. Prior to the change, the employees had relied upon Friday paychecks covering a full week's work. The employees had come to plan their personal finances around receipt of that full check. On that Thursday, January 10, Respondent provided them with only a 3-day check, causing consternation and complaint. The complaint was legitimate and led Respondent to provide short-term loans to over half the staff to cover their shortfall.

The pay period alteration was a significant event and constituted a material and substantial change in the employees' terms and conditions of employment. Moreover, it occurred in the normal course of things, not compelled by any unusual business circumstance. Despite that, Respondent failed to notify the Union of its intent. It acted as if the Union was not on the scene or did not represent the employees who would be affected by the change. Rather obviously, had the Union been notified, the switch could have been accomplished more smoothly. Indeed, the two days pay now hidden in the holdback may well have been paid out without the necessity for the advances or the employees' having been shorted at all. The crude matter in which Respondent carried out its changeover could have been avoided entirely. Certainly the Union was not obligated to accept such a fait accompli. Furthermore, ignoring the Union as it has, clearly has the tendency to undermine the Union's status in the eyes of the employees. This is a classic unilateral change requiring a remedy under §8(a)(5). [12]

In addition, the complaint asserts that each of the incidents set forth as unlawful unilateral changes also constituted unlawful direct dealing. With respect to the allegations concerning the productivity bonus programs and the paid holiday issues I am unable to concur with the General Counsel's complaint. Simply notifying the employees that a unilateral change will affect them does not constitute unlawful direct dealing. *Johnson's Industrial Caterers*, 197 NLRB 352 (1972). There, the Board adopted Trial Examiner Henry Jalette's decision where he said, at 356:

> The unilateral changes announced on July 9, which I have found violative of Section 8(a)(5) because they were instituted without notice to or consultation with the majority representative, are also alleged . . . to be violative of Section 8(a)(5) on the ground that when Respondent met with the employees on July 9 and announced the changes in method of operations, and when thereafter it discussed with employees problems that arose under the new system, it was engaged in direct dealing with the employees in derogation of the status of the Union as majority representative. Of course, the unilateral

[12] "An employer must inform the union of its proposed actions under circumstances which at least afford a reasonable opportunity for counter arguments or proposals." *NLRB v. Centra*, 954 F. 2d 366, 372 (6th Cir. 1992). "If a policy is implemented too quickly after notice is given, or an employer has no intention of changing its mind, the notice constitutes nothing more than informing the union of a fait accompli." Id. Also, *Roll & Hold Warehouse & Distribution Corp.*, 325 NLRB 41 at 42, n. 4 (1997), enfd. 162 F. 3d 513 (7th Cir, 1998): "By announcing the [wage increase] to the [Union] at the same time as all other employees, the respondent essentially ignored the representative status of the employees' bargaining agent. Such failure to acknowledge the [Union's] proper role in negotiating terms and conditions of employment severely diminished, if not effectively foreclosed, any meaningful opportunity for the [Unions] to exercise [their] authority in this matter."

conduct derogated from the Union's status as majority representative and little is added either to the remedy in this case or the body of law on the subject to find a violation on the theory of direct dealing. In my judgment, the conduct of Respondent did not constitute direct dealing with employees in the sense in which the term is normally used. Respondent was not making offers to employees seeking acceptances, nor was it seeking to induce employees to repudiate the Union. While the effect of its unilateral change in working conditions was to undermine the Union, I cannot see how the implementation and announcement of what was clearly a predetermined course of action constituted direct dealing. *Huttig Sash and Door Company, Incorporated*, 154 NLRB 811, 817 (1965). Compare *Dan Dee West Virginia Corp.*, 180 NLRB 534 at 539 (1970).

Assuming that the employees were actually victims of a unilateral change with respect to the productivity bonus and holiday pay matters, Respondent simply announced the changes and did not bargain with the employees of all. Making the same observation as Trial Examiner Jalette did in *Johnson's*, I observe that Respondent simply followed a predetermined course in implementing them. There can be no direct dealing violation in such a circumstance.

The same cannot be said for the change in pay period. Not only did it constitute an unlawful unilateral change, Respondent dealt directly with those individuals who faced a hardship, offering them a loan to cover the change in payday and lost two days wages. In directly dealing with its employees in this fashion and without involving the Union in its transactions concerning their pay matters, Respondent violated §8(a)(5) of the Act. The Union was the §9(a) exclusive collective bargaining representative of the employees. Respondent had the obligation to deal with it, not skip it or act as if it had no role in such matters. See *Blue Circle Cement Co.*, 319 NLRB 954 (1995). There, the Board not only found unlawful a unilateral change in the starting time for a shift, in addition it found that the respondent had committed a direct dealing violation under §8(a)(5) when discussing with union-represented employees their preference concerning earlier start times on other shifts. Accordingly, Respondent's offer of loans to cover the pay shortfall was unlawful direct dealing.

Remedy

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. The affirmative action will include an order to post a notice to employees advising them of the remedial steps it will take. It shall also require Respondent to pay the employees the 2 days wages it improperly placed into the holdback account when it changed payroll periods in January 2002, together with interest on the amount improperly withheld. Interest will be calculated under *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Based on the foregoing findings of fact and the entire record in this case, I hereby issue the following

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of § 2(2), (6) and (7) of the Act.
2. The Union is a labor organization within the meaning of § 2(5) of the Act.
3. The General Counsel has failed to prove by credible evidence that Respondent threated to discharge its employee Keith Scarboro in violation of §8(a)(1) of the Act.
4. Respondent did not violate §8(a)(5) when it modified its productivity bonus program, when it granted its employees a paid holiday on the day after Thanksgiving 2001 or when it granted its employees a paid holiday for Christmas Eve 2001.

5. Respondent violated §8(a)(5) and (1) of the Act when on January 9, 2002 it unilaterally changed the payroll period, causing employees to receive short paychecks and rolling the amount owed them into the pay holdback.

6. Respondent on January 9, 2002 violated §8(a)(5) and (1) by dealing directly with employees in the collective-bargaining unit with respect to pay matters.

Based on the foregoing findings of fact and conclusions of law and the entire record, I issue the following recommended: [13]

ORDER

Respondent, Sonic Automotive, formerly d/b/a Capitol Ford, currently d/b/a Friendly Ford, San Jose, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

a. Making unilateral changes in the payroll period or in other terms or conditions of employment covering bargaining unit employees, without prior notice to or bargaining with the Union as their exclusive collective bargaining representative.

b. Dealing directly with bargaining unit employees with respect to their rates of pay, wages, hours, or other terms and conditions of employment.

c. In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by § 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

a. Within 14 days of the Board's decision, pay to the employees in the bargaining unit, together with interest, the 2 days wages placed in the payroll holdback account in January 2002, together with interest as set forth in the Remedy section of this decision.

b. Within 14 days after service by the Region post at its business in San Jose, California, copies of the attached notice marked "Appendix." [14] Copies of the notice, on forms provided by the Regional Director for Region 32 after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since January 9, 2002.

[13] If no exceptions are filed as provided by § 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in § 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[14] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

c. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps Respondent has taken to comply.

James M. Kennedy
Administrative Law Judge

Dated: February 28, 2003

"Appendix"

Notice to Employees
Posted By Order of the
National Labor Relations Board

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT make unilateral changes in the payroll period or in other terms or conditions of employment in the bargaining unit of our employees represented by the **International Association of Machinists & Aerospace Workers, District Lodge 190, Local Lodge No. 1101, AFL-CIO**, without prior notice to or bargaining with that Union as your exclusive collective bargaining representative.

WE WILL NOT deal directly with our employees in that bargaining unit with respect to rates of pay, wages, hours, or other terms and conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by federal law.

WE WILL pay the employees in the bargaining unit the 2 days wages which we placed in the payroll holdback account in January 2002, together with interest.

SONIC AUTOMOTIVE, formerly d/b/a
CAPITOL FORD, currently d/b/a
FRIENDLY FORD
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

1301 Clay Street, Federal Building, Room 300N, Oakland, CA 94612-5211

(510) 637-3300, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (510) 637-3270.